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## SOME REFLECTIONS ON THE GERMAN CONSTITUTION.

“Remember that you are the chosen people! The Spirit of the Lord has descended upon me because I am the Emperor of the Germans!

“I am the instrument of the Almighty. I am His sword, His agent. Woe and death to all those who do not believe in my mission! Woe and death to the cowards!

“Let them perish, all the enemies of the German people! God demands their destruction, God who, by my mouth, bids you to do His will!”

(William II Proclamation to the Army of the East, 1914.)

**T**HIS extract is taken from a little book, “*Out of Their Own Mouths*,” published by Appleton & Company last year, with an introduction by William Roscoe Thayer of Cambridge.

However, in an article, which I intend shall be written with professional accuracy, I would not be understood as warranting the absolute authenticity of this extract. I assume, however, that it is entirely correct, and make it, to some extent, my text in a discussion of the German Constitution; because, if the wretched creature to whom this language is imputed did not employ it on the occasion in question, it is easy to demonstrate that such are his professed views, often expressed and established by evidence that cannot be questioned.

This statement is but a modern declaration of the age-old doctrine, medieval and tyrannous, that kings were the Lord’s anointed, and ruled, not by mere human selection, but by divine right. I say this is a modern statement, and so it is in respect of the date of its deliverance, but in nothing else. It breathes the spirit of tyranny and oppression, and is associated with the darkest ages of the world’s history. It shows dimly through the blood of Charles I, of England, and Louis XVI, of France.

It finds its express repudiation in the memorable Declaration of Independence; and its practical rejection by the civilized world in that, he who uttered it, is, with a few insignificant ex-

ceptions, the last tyrant who claims and asserts for himself a more than pontifical infallibility and the divine approval of his long record, blackened by every crime against humanity and civilization which it is possible for the mind to imagine, and of a character so foul and base that the recital is hardly possible, consistently with the requirements of ordinary decency.

The work, from which I have made this extract, has, upon its title page, this language, attributed to Frederic II, of Prussia, miscalled "The Great," "I begin by taking; later I shall find pedants to show that I was quite within my rights." Such has ever been the history of society. Success always justifies its own means. It is, as Lamartine says, the lodestone of the vulgar. So pedants have not been wanting in the past, men of assumed learning and false hearts, to justify every existing wrong, including the claim of tyrants to rule by divine right.

Everything that could and had been said, up to that time, in favor of this preposterous assertion was completely answered by a great Virginian—probably the most profound and far seeing statesman that the world has ever produced—Thomas Jefferson. This answer was in very few words, and is found in his first inaugural message:

"Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of kings to govern men? Let history answer this question."

I have had occasion before to remark that, while it has been recorded that a wise man said, he cared not who wrote the laws of a country so he might write its songs, a still wiser man might well say, he cared not who wrote the laws of a country so he might administer them.

Much has been said and written in pro-Germanic praise of the German Constitution. It has been represented as establishing in effect a sort of parliamentary government, in which the Emperor is called the president of a confederation of States, and has actually perhaps less power than the President of the United States.<sup>1</sup>

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<sup>1</sup> See an article by Prof. Otto Gierke, 23 HARV. LAW REV. 273-282.

It has also been given out that the German Constitution is exceedingly difficult to understand, very complicated, as if it quite passed the comprehension of any but a German or pseudo-German intellectual, and was entirely beyond that of the average American lawyer, let alone the average citizen of this country.

No doubt, like every written document, its language often admits of various constructions; but I think it is possible to state, in comparatively brief compass, its essential features. This is made, perhaps, more difficult by the fact that this Constitution, unlike that of our own country, is not a statement drawn in broad outline, of the general principles on which the government it creates is to be carried on, leaving the particulars to be filled in by legislation; but that, in singular and somewhat irrelevant fashion, it descends to such particulars. It goes so far as to prescribe the colors of the flag for the navy and merchant marine,<sup>2</sup> and to indicate<sup>3</sup> the nature of the uniform to be worn by the army, and the method in which the regiments shall be numbered. In this respect it more resembles the constitution of some of the States.

There is a singular and perverse impulse in the minds of some men, and by no means confined to constitution makers and legislators, that leads them to think that every situation is to be met by creating rules of conduct, and that all contingencies may thus be provided for and all evils thus anticipated and corrected. This is, I think, a peculiarly German idea, however, and one which largely inspires the activity of that people in the way of regulation. To persons of this mind, if some difficulty is presented, the way to correct it is by passing a law or making a new rule for that particular case, in doing which they frequently breed far more difficulties than they cure.

We now find the government of this nation hampered and hindered by what is popularly referred to as "red tape," but which is nothing more than a bureaucratic system of minute rules and regulations, so that some of the departments of government, instead of devoting all their energies towards the important duties devolving upon them at this time, are largely occupied in the effort to study, understand and follow the rules and regula-

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<sup>2</sup> Art. 55.

<sup>3</sup> Art. 63.

tions which they have themselves prescribed for the supposed convenient dispatch of the public business. They will ultimately find that nothing takes the place of administrative faculty and that this cannot be created by prescribing rules.

It was the effort of the fathers of this great republic to draw, in broad outline, the general scheme and plan of its government, and not to attempt to deal in detail with every possible contingency that the future might present. It was a wonderful plan of government, and it has, in a marvelous manner, answered the requirements of the mighty people that have grown up under it.

No one can read the German Constitution without a feeling that this document, in so far at least as it is a constitution of federated states, was largely influenced by the Constitution of the United States, although, as I shall presently indicate, the most essential features of that Constitution, so far as liberty is concerned, are entirely wanting in that of Germany.

The Constitution of Germany is found in fourteen sections, embracing in all seventy-eight subdivisions called articles and numbered consecutively. It was adopted April 16th, 1871, just after the Franco-Prussian War, though shortly before the treaty of peace was ratified. It has been amended in some particulars. I take it as found in Professor Dodd's *Modern Constitution*.<sup>4</sup>

The opening paragraph is as follows:

"His Majesty the King of Prussia, in the name of the North German Confederation, His Majesty the King of Bavaria, His Majesty the King of Württemberg, His Royal Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and Rhenish Hesse for those parts of the Grand Duchy of Hesse lying South of the Main, conclude an eternal alliance for the protection of the territory of the confederation, and of the rights of the same as well as for the promotion of the welfare of the German people. This confederation shall bear the name of the German Empire, and shall have the following constitution."

I cannot refrain from quoting, in connection with this prologue to a king-made constitution, the simple and majestic language with which our own begins:

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<sup>4</sup> (1909), p. 325.

"We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The German Constitution did not apparently have as its declared object, either to establish justice or to secure to the people living under it the blessings of liberty. Therefore, it provides for no judicial system and contains no series of constitutional limitations designed to secure the great essential rights to life, to liberty and to property, nor that right without which all others stipulated exist only on paper, the right to trial by jury. On the contrary, it recognizes, as we shall see in Article 74, the right to virtually destroy free speech in the discussion of public men and measures.

I sincerely trust that the foolish and narrowminded individuals, who, as in all times of great crisis, rush to the front (except the battle front) and deafen the ears of the people with their shrill asseverations of loyalty and patriotism, may not succeed in convincing those in authority that there is occasion or popular demand for any abrogation at this time of the constitutional guarantees of free speech and a free press, nor that the legality of criticism of public men and measures depends on whether, tested by some theoretical and impossible standard, it is destructive and injurious or, to use a much overworked word, constructive. Free and vigorous criticism of public matters is an essential to effective popular government, and, indeed, a vital part of it.

The first section of the German Constitution merely defines the territory of the Empire. The second indicates the limits of the right of the Empire to legislate as against the several States. Without stating it more fully, it may be said to follow along the general lines of our own Constitution in this respect. It closes in Article 5 with this provision:

"With respect to laws concerning the Army, or Navy, or the taxes specified in Article 35 [being all Imperial taxes] the vote of the praesidium shall decide, in case of a difference of opinion in the Bundesrat, if such vote be in favor of the maintenance of existing arrangements."

Professor Dodd says that "praesidium" means Prussia. This is not strictly correct; or, if technically so, is highly misleading. What it really means is the German Emperor, in his capacity as King of Prussia, as will appear when the constitution of the Bundesrat or Federal Council is considered.

Thus the Emperor has an absolute and final veto on any change in imperial legislation as to the army, navy or taxation. For this and other reasons it is not, therefore, so important as some doctrinaires seem to suppose that he has no qualified general veto power like that of our President.

Section 3 deals with the Bundesrat or Federal Council. This body, it is declared, shall consist of representatives of the members of the Confederation, having in all fifty-eight votes, each member of the Confederation being permitted to appoint as many delegates as it has votes, the votes of each State to be cast only as a unit.

The members from each State are chosen by the kings or princes at the head of them respectively, except those from Alsace and Lorraine and the free cities.<sup>5</sup> Prussia has seventeen votes, the largest number of any State, and these are absolutely controlled by the Emperor, who, as King of Prussia, appoints her representatives.

The Council, it is provided, shall:

- (1) Take action on measures to be proposed to the Reichstag and the resolutions passed by that body.
- (2) The provisions and arrangements necessary for the execution of the imperial laws.
- (3) Defects discovered in the execution of those laws, etc.

In case of a tie, the praesidium (*i. e.*, the Emperor) decides.<sup>6</sup>

Various committees to be constituted by the Council are provided for, and it is provided that on each there shall be representatives of at least four States besides the praesidium, each State to have one vote. The Council elects the members of all

<sup>5</sup> See remarks of President Fess of Antioch, a member of Congress from the Sixth District of Ohio, made in Congress Sept. 25, 1917. See also, 2 BURGESS, POL. SC. & CONST. LAW, pp. 79-91; Prof. Gierke, *ubi supra*, p. 283.

<sup>6</sup> Art. 7.

committees, except that of the army and fortifications in which Bavaria has permanent representation. The remaining members of that committee, as well as the committee on marine affairs, are appointed by the Emperor. A specially constituted committee is created on foreign affairs.<sup>7</sup>

Each member of the council has the right of audience in the Reichstag, in order to represent the views of his government, even when such views have not been adopted by a majority of the Council. No one can at the same time be a member of the Council and the Reichstag.<sup>8</sup>

Section 4 deals with the Presidency which goes to the King of Prussia with the title of German Emperor. It is declared to be his duty to represent the Empire among nations, to declare war and to conclude peace, to make treaties and accredit and receive ambassadors.

This form of grant of power seems singular in that it imposes upon the Emperor the duty to declare war. He seems not to have failed in this regard so far as the present war is concerned, though he has not yet performed his related duty of concluding peace.

As will be remembered by American lawyers that, under our Constitution, the power to declare war is vested in Congress, but no such duty is imposed.

For a declaration of war by the Empire, the consent of the Federal Council (King-made) is required, except in case of attack on federal territory or coasts, *i. e.*, except in case of a defensive war.<sup>9</sup> The Emperor's idea of what is such has been so frequently and so recently expressed, that the efficacy of this slight restraint upon his "duty" in this regard may well be doubted. His control of the army and navy is so complete, the rights and liberties of his subjects are so completely in his control, the entire judicial establishment of the Empire is so ineffectual for the protection of the rights of the individual, and the temper of the people is so servile, that in this, as in most essentials, the Emperor rules with practically absolute power.

That similar authority, in some respects, is recognized, even

<sup>7</sup> Art. 8.

<sup>8</sup> Art. 9.

<sup>9</sup> Art. 11.

in our President in times of great national crisis, may be conceded. But this is due, not to a plan of constitutional government carefully elaborated to that end, but rather to the compelling exigencies of the situation. *Inter arma silent leges.* And under our system, while a President may provoke, he cannot declare, a war.

The Emperor appoints the chancellor, who presides in the Council and supervises the conduct of its business.<sup>10</sup> This further illustrates that this body is largely executive, to some extent a kind of imperial cabinet.

The necessary bills are to be laid before the Reichstag by the Council, and shall be advocated there by the members of the Council or commissioners appointed by that body.<sup>11</sup> This seems somewhat analogous to the English practice by which the ministry bring in bills.

I do not attach any special importance to Article 17, which announces the duty of the Emperor to publish the laws and supervise their execution, except to its phraseology in declaring that the "decrees and ordinances of the Emperor shall be issued in the name of the Empire," etc. This is a singular suggestion of absolutism. However, I refer to this article in passing principally because apparently some publicists have argued that, unless the Emperor promulgates the laws, they are ineffective. Quite so, as long as he controls the army and navy so absolutely.

Article 18 provides that the Emperor shall appoint imperial officials, cause them to take the oath to the Empire, and dismiss them when necessary. This is a sweeping grant of power as to all officers on the civic list.<sup>12</sup>

Article 19 provides for coercion of the States in the performance of their constitutional duties by the Emperor and Council.

The provisions as to the Reichstag, or popular branch of the legislature, are found in Section 5. They are of no special importance, so far as the general legislative powers of the Empire are concerned.

The Reichstag consists, by Article 20, of 382 members. Of

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<sup>10</sup> Art. 15.

<sup>11</sup> Art. 16.

<sup>12</sup> See 2 BURGESS, POL. SC. & CONST. LAW, p. 284.

this number, until regulation by law, Bavaria chooses 48, Württemburg 17, Baden 14, Hesse, South of the Main 6, leaving 297 as the number elected by the North German Confederation. The great majority of those thus chosen come from Prussia.

By Article 22 it is provided that the proceedings of the Reichstag shall be public, and that no one shall be held responsible for truthful reports thereof. There seems to be no such provision as to proceedings of the Council, and its meetings may be and often are secret.

The Constitution contains no provision as to the election of members of the Reichstag, except that they shall be chosen in a general direct election and by secret ballot. By statute it is provided, with a few exceptions similar to those in our election laws, that every (male) German of the age of twenty-five and upwards may vote for such members, and is eligible to membership in the Reichstag. Members are elected for five years.<sup>13</sup>

This body may be dissolved by resolution of the Federal Council with the consent of the Emperor;<sup>14</sup> but, in such case, new elections within 60 days must take place, and it must be called together within 90 days after dissolution.<sup>15</sup> To render its action valid, the presence of a majority of the statutory number of members is required.<sup>16</sup>

It is declared that the members of the Reichstag are the representatives of the people as a whole, and shall not be bound by orders or instructions.<sup>17</sup> This seems to be a meaningless and wholly unnecessary provision. No legislative body in the exercise of its powers is subject either to orders or instructions, so far as I know, nor is it conceivable that it should be. Many matters may not be within its competence; as to these it has no right to legislate. But in the field of its conceded powers it is a contradiction and absurdity to suppose it can be bound either by orders or instructions.

Members of this body by law receive small salaries—about \$700—and certain free transportation.

I have already commented on the fact that the German Con-

<sup>13</sup> Art. 24.

<sup>15</sup> Art. 25.

<sup>14</sup> *Ib.*

<sup>16</sup> Art. 28.

<sup>17</sup> Art. 29.

stitution creates no judicial department, contains no constitutional limitations in respect of the rights of the individual and does not secure trial by jury.

To this it may be answered, that the same thing may truly be said of the Constitution of Great Britain, where all the essential rights of the individual are perhaps as carefully guarded and scrupulously respected as in any land, and which is perhaps the freest and best governed country in the world.

But England has no written constitution. Indeed it might be not inaccurately said that while she has institutions of government, she has no constitution. Her system of government is parliamentary. The omnipotence of her legislature is axiomatic in English constitutional law.

While it is true the concurrence of the Lords has always been necessary in order to legislation, changes in this regard have been made in recent years; and while it is also true that, theoretically, the King may create peers in sufficient number to establish a majority, as well pointed out by President Fess in the very able address already referred to, this is always done only on recommendation of his ministers, and avails nothing unless the Ministry can secure the support of the Commons, as upon adverse vote in that house, on any essential question of policy, the Ministry goes out. So this power of the King is usually only effective *in terrorem* and seldom exercised, and can only be efficiently employed to coerce the Lords to yield to the Commons. Therefore, the government of England is absolutely responsible to the people, represented by the Commons, and is purely legislative. Whatever power, supposed to reside in the crown at one time, existed to withhold the Royal assent, has become so atrophied by disuse as to be practically non-existent.

Yet we know as a general rule, individual right is quite as secure in England as in our own favored land. This is due to the institutions of England, its courts with their settled rules and maxims, trial by jury, and all that wonderful structure of the common law supported and guarded by the universal sentiment of a liberty loving race.

Upon this subject, the eloquent language of one of her great-

est statesmen, employed in a parliamentary debate in 1865, is not wholly impertinent. On this occasion Mr. Disraeli said:<sup>18</sup>

“You have an ancient, powerful, richly-endowed church and perfect religious liberty. You have unbroken order and complete freedom. You have landed estates as large as the Romans, combined with commercial enterprise such as Carthage and Venice united never equalled. And you must remember that this peculiar country, with these strong contrasts, is not governed by force; it is not governed by standing armies; it is governed by a most singular series of traditional influences, which generation after generation cherishes because it knows that they embalm custom and represent law.”

If the government of Germany were truly parliamentary, it might be free in the sense that it represented the sentiment of her people and the “traditional influences” of that country. It could not be what free government is in England and this country; because the vital principles of liberty, as understood by the English speaking race, are alien to her medieval and darkened understanding. “Do men gather grapes of thorns, or figs of thistles?”

This is, however, mere speculation. For the government of Germany is not legislative and she has no parliament. The Reichstag is a mere simulacrum of a popular assembly and the Bundesrat the poor puppet of princes, dominated by their feudal lord.

Owing to the peculiar arrangement of the German Constitution, essentially topical and quite unlike our own, it is impossible, from the general provisions as to any one organ of government, to ascertain the nature and extent of its powers. Therefore, it is necessary to consider further sections of the Constitution as to various subjects, before attempting to substantiate the statement just made as to the meagre and phantom-like character of the Reichstag as a parliament of the people.

Section 6 deals with customs and commerce.

Article 33 constitutes the Empire as one territory for these purposes, with the somewhat ambiguous qualification that such

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<sup>18</sup> 4 MONYPENNY & BUCKLE, LIFE OF DISRAELI, p. 410.

parts, as by reason of their situation cannot be suitably embraced within the customs frontier, shall be excluded.

In the same article is a provision for qualified free trade between the States, commodities brought from one State to another to be subject only to such internal taxes in the State into which they are brought as are there imposed on similar domestic productions.

By Article 34 the Cities of Bremen and Hamburg, with part of their own or surrounding territory suitable for such purpose, shall remain free ports outside the customs frontier until they request admission within it.

Article 35 confers upon the Empire the exclusive power to legislate concerning everything relating to customs; the taxation of salt and tobacco produced in federal territory, of domestic brandy and beer, sugar and syrup prepared from beets or other domestic products; concerning protection against fraud with reference to taxes upon articles of consumption levied in the several States, as well as concerning measures required in territory outside the customs boundaries for the security of the customs frontier. But in Bavaria, Württemberg and Baden taxation of domestic brandy and beer is reserved to the legislation of the States, with a sort of general allocution to the States of the Confederacy to bring about uniform legislation regarding the taxation of these articles.

By Article 36 the administration and collection of customs and taxes on articles of consumption are left to each State within its own territory, so far as these functions have been theretofore exercised by each State.

This is, however, subject to the provision that the Emperor shall superintend the observance of legal methods by means of imperial officers appointed by him after consulting the committee of the Council on customs, duties and taxes to act in cooperation with the tax officials and boards of the States. Reports of these officers as to defects in the administration of the joint legislation are to be made to the Council for action.

Article 37 provides that, in taking action on the rules and regulations for the execution of the joint legislation, the vote

of the Praesidium (*i. e.*, the Emperor) shall decide when cast in favor of the existing rule and regulation.

Article 38 provides that the revenues from customs and other taxes, so far as the latter are subject to imperial legislation, consisting of the total receipts from customs and excise taxes after certain specified deductions for tax rebates, refunds, costs of collection, costs to the several States for administering certain taxes, and 15 per cent. of total receipts of other taxes, shall go to the treasury of the Empire.

There are one or two other and minor provisions which seem unimportant.

Article 39 provides for quarterly summaries by the revenue officers of the several States, and a final statement at the end of the year, after closing accounts of the receipts due in each of these periods from customs and taxes on consumption which go to the imperial treasury, and that these accounts shall be arranged by the administrative officers of the several States, after a preliminary audit into general summaries, in which each tax shall be separately entered. These summaries go to the Committee of Accounts of the Council. That Committee, on the basis of these summaries, shall fix provisionally every three months the amounts due the imperial treasury from each State, and advise the Council and the States of the amount so fixed, and submit to the Council annually the final statement of these amounts with its remarks. The Council shall take action upon the determination of such amounts.

It is to be observed that the collection of taxes and customs and the general execution and enforcement of the revenue laws and the assessments against and collection from the States, are, so far as the Empire is concerned, committed by the Constitution to the Emperor and the Council. This is not subject to change, except by amendment to the Constitution and, as will hereafter appear, no such amendment is possible without the consent of the Emperor.

I have thus stated with some fullness the general provisions as to the imperial revenue as it is, in respect of its control over matters of finance that the authority of the Reichstag as the popular body of the imperial legislature is commonly assented.

I do not deem it either sound or wise to deny that this power to withhold appropriations and to share equally with the council in financial legislation, subject to constitutional provisions, already quoted, exists in the Reichstag. It is an important power, and if exercised by an able, fearless and independent legislative chamber would be of the greatest value.

But when we observe how subservient, in this free land, our Congress is to the executive, and when we consider how long tutelage in tyranny has developed in Germany that servility to imperial authority which, with their inherent brutality to the weak and the helpless, seems to be among the most permanent and conspicuous characteristics of the ruling classes of the German people, it is obvious that whatever power the Reichstag possesses in this regard, it is never effectively exercised. Some socialists vapor and threaten and get themselves into jail without accomplishing anything in the way of the intelligent and courageous exercise of this power.

The purposes of the Emperor and his military advisers always prevail, and will continue to do so until the righteous energy of an indignant world shall, by force, bring the imperial miscreant to his knees with his whole crew of murderous and villainous co-conspirators.

I affirm, however, that complete constitutional power exists in the Reichstag absolutely to frustrate the bloody purposes of the Emperor; and hence am somewhat skeptical as to the distinction asserted in high places between making war on that personage and his government, and on the German people.

However, it is true that the effect of the constitutional provisions quoted, and others presently to be mentioned, is, and no doubt was, intended, to degrade the Reichstag from the high position which a parliament of the people ought to occupy in a free country, to a mere useless appendix to an imperial and tyrannous oligarchy, so this apparent grant of authority to that body does but "Keep the word of promise to our ear, and break it to our hope."

Liberty is not a matter of constitutions and statutes. It cannot thrive where it is not deeply shrined in the hearts of a people.

To the German people what could be more appropriate on this subject than the words of their immortal poet?

“Yes! to this thought I hold with firm persistence;  
The last result of wisdom stamps it true;  
He only earns his freedom and existence  
Who daily conquers them anew.”

Section 7 deals with railways, which are largely state owned and operated in Germany. The provisions on this subject are not especially germane to this article. Suffice it to say that the Empire controls railway charges, is superior to the several States, and occupies a somewhat similar position, in this regard, to that of our own country. There are, however, detailed provisions in this section as to control of railways, which quite naturally are not found in our Constitution, as, in the first place, its framers seldom dealt with details, and second, when it was adopted there were no railways.

Article 46 provides that, in case of public distress, the Emperor may prescribe a low special tariff suited to the circumstances for the transport of certain food stuffs, which, however, must not be lower than the lowest existing rate for raw produce on the line.

Section 8 deals with the postal and telegraph system, and declares them to be state institutions throughout the German Empire.<sup>19</sup> Article 50 vests the Emperor with the supreme administration of these agencies, provides for officers to administer them to be appointed by him, gives him power to prescribe regulations, and exclusive right to regulate the relations of these systems with the postal and telegraph systems of other countries. It is declared to be the duty of all officers in this service to obey the orders of the Emperor and that this obligation shall be assumed in the oath of office.

These very important provisions seem to exclude practically all legislative power in this field, and to leave the absolute control of the distribution of communications and intelligence by these agencies to the Emperor.

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<sup>19</sup> Art. 48.

Section 9 deals with Marine and Navigation. It declares<sup>20</sup> that the navy of the Empire shall be a united one, under the supreme command of the Emperor; that he is charged with its organization and construction, shall appoint its officers and employees, and they and the seamen shall take an oath of obedience to him. All seafaring men, including machinists and seamen, are exempt from army service but liable to service in the imperial navy. There are other provisions, as to the merchant marine securing equality of right to all German merchant vessels in the waters of the several States, with some provision as to port fees, taxes, etc. They call for no special comment.

Section 10 deals with consular affairs, over which it is declared<sup>21</sup> the Emperor shall have supervision, and shall appoint consuls after hearing the council committee on Trade and Commerce.

Section 11 treats of military affairs. It provides<sup>22</sup> for universal military service; for the costs and burden thereof;<sup>23</sup> prescribes<sup>24</sup> the period of service; fixes<sup>25</sup> the proportion which the army, on a peace footing, shall bear to population up to Dec. 31st, 1871; and declares that, after that date, the effective strength in time of peace shall be fixed by Imperial legislation.

It also declares<sup>26</sup> that after the publication of the Constitution, the entire Prussian military system, both statutes, regulations, instructions, etc., shall be introduced throughout the Empire without delay; and that after the Army has been thus organized for war purposes, a comprehensive military code shall be submitted to the Reichstag and to the Council, for their action in accordance with the Constitution.

Article 63 provides that the total land force of the Empire shall form one army, which shall be under the command of the Emperor in war and in peace. Also, that he shall determine the strength, composition and division of the contingents of the imperial army, and also the organization of the Landwehr or

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<sup>20</sup> Art. 53.

<sup>23</sup> Art. 58.

<sup>21</sup> Art. 56.

<sup>24</sup> Art. 59.

<sup>22</sup> Art. 57.

<sup>25</sup> Art. 60.

<sup>26</sup> Art. 61.

National Guard; and that he shall have the right to determine the garrisons within the territory of the Union, as also to mobilize any portions of the imperial army.

It is required <sup>27</sup> that all German troops render unconditional obedience to the commands of the Emperor, and that this obligation be included in the military oath. He appoints the commander in chief of a contingent, as well as all commanding more than one contingent, and all commanders of fortresses. The appointment of all generals, and officers performing the duties of generals, are subject to his approval. The contingents are the forces raised in the several States.<sup>28</sup>

The right to construct fortresses <sup>29</sup> belongs to the Emperor, and he is directed to ask the grant of means for that purpose, unless already included in regular appropriations.

Article 66 provides that, in the absence of special conventions, the Princes of the Confederation and the senates shall appoint the officers of their respective contingents, subject to the provisions of the preceding article. It defines in other respects their rights and privileges in this regard.

Article 68 declares that the Emperor, if public security within the federal territory is threatened, may declare martial law in any part of the Empire. The provisions of this section are to be applied to Bavaria and Württemberg, in accordance with certain conventions or treaties.

It is quite apparent, without detailed comment, that the Emperor in the enjoyment of these extensive powers as to the army and navy, especially the former, including his power to declare war, exercises both executive and legislative authority of the most sweeping character. In fact, except for the necessity of asking for appropriations to support the expenses of these establishments, he appears to be the supreme authority in this domain. While he may not control the purse, he wields the sword of the nation.

This reminds me that long ago and before the civil war, a discussion arose in our House of Representatives over some fiscal question, in the course of which, some members declaimed

<sup>27</sup> Art. 64.

<sup>28</sup> Art. 65.

<sup>29</sup> Gierke, *supra*, p. 280.

eloquently against uniting the control of the purse and the sword in the same hands. Whereupon Henry A Wise, then in Congress from Virginia, and afterwards Governor, a brilliant and effective debater, said that he did not regard this as a matter of vital importance, because, in any event, the man with the sword would be able soon to relieve the man without it, of his control of the purse. This, in substance, is what has happened in Germany.

It is also of vital importance that these powers are exercised by the Emperor, pursuant to constitutional provisions, and that they cannot be withdrawn by amendment without his consent, as fourteen votes in the council are enough to defeat an amendment and Prussia has seventeen, all controlled by the Emperor.<sup>30</sup>

Section 12 deals with the matter of finances.

It provides<sup>31</sup> for a yearly budget and<sup>32</sup> that, in so far as the common expenses are not covered by joint revenues derived from taxes, customs, railways, postal and telegraph systems, they shall be met by contributions from the several States in proportion to population, such contributions to be fixed by the Imperial Chancellor, with references to the total amount established by the budget. As the Chancellor is absolutely under the control of the Emperor, this power is in effect, but another of the latter's prerogatives.

Article 71 provides that general appropriations, as a rule, shall be granted for one year, but may, in special cases, be granted for a longer period. It is also provided that during the period of transition fixed by Article 60, *i e.*, until Dec. 31st, 1871, the estimate for the army shall be laid before the Council and the Reichstag, merely for their information.

Article 72 provides that, for the purposes of discharge, an annual report of the disbursement of all revenues shall be presented through the Chancellor to the Council and Reichstag for their approval.

Article 73 declares that in case of extraordinary need, a loan may be contracted or a guaranty assumed, as a charge upon the Empire by means of Imperial legislation.

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<sup>30</sup> *Infra.*

<sup>32</sup> Art. 70.

<sup>31</sup> Art. 69.

Some modifications, due to treaty, are made as to expenditures for the Bavarian Army.

Section 13 relates to settlements of disputes and penal provisions.

Article 74, besides aiming apparently at treason, is a kind of compendious interdict against criticism of public officials and countenances, even if it does not expressly authorize, punishment for *lese-majesty* so often referred to before the present war.

Article 75 declares that, for offenses specified in Article 74 equivalent to high treason, the Superior Court of Appeals of the three free Hanse cities at Lübeck shall be the competent deciding tribunal in the first and last resort.

Article 76 provides for the settlement of disputes between the States by the Federal council where they are not matters of private law, and on request of one of the parties. There is further provision in this article for settlement of constitutional questions in States whose constitutions do not provide for their determination.

Article 77 provides that, if justice is denied in one of the States, the Council shall receive complaints, and thereupon, and on proof, obtain judicial relief from the State which has given occasion to the complaint.

Section 14 consisting of Article 78, regulates amendments to the Constitution. It provides that they shall be made by legislative enactment, and shall be considered rejected when fourteen votes are cast against them in the Council. As Prussia has seventeen absolutely controlled by the Emperor, no amendment can be adopted without his consent. Rights, secured by the Constitution to particular States in their relation to the whole, can be changed only with the consent of the States affected.

This is a compendious, and I hope reasonably accurate, statement of most of the provisions of the German Constitution. I have not attempted to treat the subject historically, nor to examine the legislation of the Empire or of the several States under which Germany is governed.

The first thing in this Constitution that strikes an American

lawyer with astonishment is, that it can be amended by legislative act. The next, that fourteen votes in the Council block any such amendment, and that the Emperor controls seventeen. It is as if our Constitution provided for a President for life, with succession to his heirs, and that no amendment to the Constitution should be permitted without his assent. Certainly no one out of a lunatic asylum would consider such a Constitution fit for a free people. This one fact shows how far the government of Germany is from being parliamentary, and what a subordinate position the Reichstag occupies in the scheme.

Moreover, there are no constitutional guarantees of personal rights. All such rights exist at the pleasure of the Government only, *dum bene placet*. There is no trial by Jury provided for, nor does it obtain in criminal cases.

Of course, in such a government judges and lawyers are little regarded, as Judge Gerard (our last Ambassador to the present government of Germany, as I fervently hope) states in his recent interesting book. Where courts and lawyers are not highly regarded, liberty does not exist.

True Germany has her professors, and a sorry lot they are; servile defenders of every infamy of which the Imperial miscreant, now at the head of their government, has been convicted by the concurrent judgment of the civilized world.

The Emperor, under the Constitution, appoints all civil officers and all in the navy. In the army he appoints or approves the appointment of all important general officers. He has absolute control of the Post Office and telegraphs and practical control of the railways, both potential revenue producers. Through the Council and Chancellor, he has a large control of the assessment collection and distribution of taxes, and, indeed, as well an almost controlling influence of all important legislation.

President Fess, in his very instructive discussion on the subject, already referred to, points out that Prussia has 232 members out of the 397 in the Reichstag. He says:

"While I admit that the constitution declares that the assent of both the Bundesrat and the Reichstag is necessary for legislation, it must be conceded that the superior power of

the Bundesrat in legislation and the authority of the Emperor over the Reichstag (i. e., to dissolve it, etc.) leave the latter body little more than a popular debating club, a mere outlet for attenuated enthusiasm, through popular discussion, with no final authority in the law-making function of the government."

The same writer says that if the Reichstag fails to appropriate, previous appropriations stand; while in England and in this country no such practice prevails.

I must be permitted to dissent from his view as to the "stupendous" benefits of Imperial legislation for the people.

Judge Gerard draws a different picture. He describes the harsh conditions and low wages of toil in that country, tells us that in Berlin 55 per cent. of the families live in one room, and that Lincoln must have had the German workingmen in mind when he declared, "You can fool some of the people all the time."

I fully agree, however, in the learned President's estimate of the place of the Emperor in the German Government:

"He is the head of the Nation, the overlord of the Bundesrat, the dissolver of the Reichstag, the head of the imperial legislation, with plenary power over tax and finance, the head of the army, to whom every soldier takes a personal oath, the head of the navy, and in all things responsible to no one save his will."

The ruler of a free people must be responsible to that people, as is ours by his short term; and that for high crimes and misdemeanors he is impeachable in the legislature, is an added and salutary safeguard. Of course, German publicists understand this, after a fashion, though the strong light of liberty dazzles their purblind vision.

In the article referred to, Professor Gierke touches gingerly on the divine right of Germany's Emperor. After declaring that the German Kaiser's position is higher in rank than that of our President, and that this is due to the "legal union of the imperial crown with the Crown of Prussia (two very German and very silly ideas) he says:

"If the Emperor were elected, as the Emperor of the former Holy German-Roman Empire used to be elected, and the

votes should be given perhaps for a prince of Reuss or Lippe, his position would be intolerably weak.

"Now the constitutional law, by which the imperial dignity is inseparably annexed to the Prussian Kingdom, alters the situation completely. The Emperor is not head of the Empire for life, but the crown is inherited by his descendants, every Emperor is the born representative of the United Nation. Every Emperor is also the born sovereign of that one of the German States which, is not only incomparably the greatest, but is endowed with a legal hegemony, etc."

The learned professor is almost as servile as some of our professors who have basked their little hour in the imperial presence.

Let the imperial lunatic speak for himself. In 1910 at Königsberg, he said as quoted by President Fess:

"It was in this spot that my grandfather in his own right placed the crown upon his head, insisting once and again that it was bestowed upon him by the grace of God alone, and not by parliaments and meetings and decisions of the people. He thus regarded himself as the chosen instrument of Heaven, and as such carried out his duties as a ruler and lord. I consider myself such an instrument of Heaven, and shall go my way without regard to the views and opinions of the day."

#### CARTHAGO DELENDA EST.

This kind of thing in the Twentieth Century must stop. I believe this to be deeply written in the hearts of the American people—yes, that it is the fixed determination of the civilized world—nay more, the irrevocable and indisputable decree of relentless fate.

To him, who thus impiously and blasphemously claims for his infamies the blessing and sanction of a just God, well may we say as the great Cardinal to Baradas:

"That my stake. Ah,  
Dark gamester what is thine? Look to it well.  
Lose not a trick. By this same hour tomorrow  
Thou shalt have France or I thy head."

*S. S. Gregory.*

CHICAGO, ILL.